BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JEFFREY L. MCALISTER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,066,391
COCHRAN CHEMICAL CO., INC.	)	
Respondent	)	
AND	)	
	)	
NATIONAL AMERICAN INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent requests review of the November 25, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore.

APPEARANCES

Scott J. Mann, of Hutchinson, Kansas, appeared for the claimant. Ronald J. Laskowski, of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from October 10, 2013, with exhibits attached and the documents of record filed with the Division.

ISSUES

The ALJ found, for preliminary hearing purposes, that claimant has sustained his burden of proving personal injury by accident arising out of and in the course of his employment, and that the accident was the prevailing factor in causing his injury, disability and need for medical treatment. Claimant was found to be entitled to medical care and respondent was ordered to provide claimant/claimant's counsel with the names of two qualified physicians from which claimant would designate an authorized treating physician. If no list of two was provided by the date and time specified, claimant was authorized to designate his own authorized treating physician. Medical expenses incurred to date were

ordered to be paid as authorized medical expenses. Temporary total disability compensation was ordered paid at the rate of $438.48 per week for the period from August 5, 2013, until claimant is released to return to work and has been offered accommodated work within temporary work restrictions, has attained maximum medical improvement, or until further Order of the Court.

Respondent appealed, requesting review of whether claimant suffered accidental injury arising out of and in the course of his employment and whether claimant has proven he suffered a compensable work accident that was the prevailing factor in causing his injury, need for medical treatment and disability. Respondent argues the ALJ's Order should be reversed and claimant's request for benefits denied as claimant has not suffered a compensable injury.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT

At the preliminary hearing, claimant alleged injury to both shoulders, neck and back from moving steel drums. Claimant came to the hearing seeking authorization for treatment, payment of past medical expenses and temporary total disability benefits if taken off work. Respondent denied the injury ever happened.

Claimant began working for respondent four to five weeks prior to the alleged accident. This was claimant's first job in the oil field chemical business. He testified there were three employees at respondent's Hays location, claimant (laborer), Mike Bryant (district manager) and Drew Miller (sales rep). Claimant testified he was not provided any kind of training when he began this job. On his first day of work, claimant assisted in replacing an injection pump. In the weeks following, he performed various tasks when instructed, including cleaning around the warehouse, pulling oil samples and installing injection pumps.

Claimant's work schedule varied depending on what needed to be done. He was provided with a company vehicle. He was on call every other weekend and averaged 60 to 70 hours a week. Claimant testified the work day began with a short meeting at 7 a.m. at the warehouse, with instructions as to what needed to be done for the day, and work assignments were given out. Part of the work claimant performed was treating pumps with chemicals. The first time claimant installed an injection pump on his own was on the date of the injury, July 19, 2013.

Claimant testified that on July 19, 2013, he was the first to arrive at the warehouse in Hays at 7:00 a.m. He found the task list for the day on the desk and took it upon himself to start loading. He started with a steel barrel that had six drums of chemical. Claimant used a dolly to transport the drums to a lift gate and then used the lift gate to get the barrels onto the truck. Claimant testified he began feeling pain in his back and arm while moving the second barrel. One barrel weighed about 450 pounds. Claimant testified that

while rolling the steel barrel, he felt a pop and sharp pain in his mid back and right arm that radiated to his shoulder, a quarter of the way up from the bottom of the shoulder blade. As the day progressed, the pain spread down into his hand and fingers. Claimant denied any low back or neck pain at the time. Claimant continued to work loading the barrels despite his pain. However, he did switch to lifting lighter things for a while before loading the rest of the barrels. Claimant left the warehouse at 8:00 a.m., and made a 3 hour drive to Nebraska.

Claimant testified he did not report his accident at the time because he thought it was something that would go away. He acknowledged having a company cell phone, but he called no one. He intended to rest over the weekend. Claimant's symptoms were not so severe as to prevent him from performing his job that day.

While in Nebraska, claimant performed a variety of tasks for a company called Four Star. He filled at various locations, dropping the chemicals, and installing an injection pump. Claimant testified it took almost two hours to get the pump going. There were other people from other companies doing their part of the work also alongside claimant. Claimant was not acquainted with any of those individuals.

Claimant testified he wasn't sure how to perform aspects of the job and when he had questions he would call Mike Bryant. At no time during these conversations with Mr. Bryan, did claimant report that he injured himself. Phone records indicate claimant and Mr. Bryant traded 16 text messages and talked six times, with the conversations lasting over one minute, on July 19, 2013. Claimant never told Mr. Bryant of his back pain or arm numbness.

Claimant did have a conversation with one of the pumpers, named Paul, about his back pain, after Paul noticed claimant was moving slow. Claimant did not mention to Paul about a specific event causing the back pain. Claimant finished his work around 8:00 p.m. He got back to Hays around 10:00 p.m. and stopped by the warehouse around 10:30 p.m.

Claimant testified he didn't report his injury because he thought it would get better over the weekend with some rest and because he didn't want to jeopardize his job. He testified that a claim with a prior employer had gone sour and he was trying to avoid a problem with this job. So, he decided to wait to make sure he had something to report before he said anything. This prior claim was to his low back. At that time, claimant underwent surgery with Dr. Poole. Claimant had no complaints of neck or upper back pain during his care with Dr. Poole, or any of the other physicians he met with at that time.

The day after the accident, Saturday, July 20, 2013, claimant was off work and was visiting with family. At around 4:00 p.m., claimant received a call from Mr. Bryant telling claimant that the had done a good job and to keep it up. About 30 minutes later, claimant received a second call from Mr. Bryant informing him that there were few things wrong with some of the work he had completed and asked claimant to come out and fix it. Claimant told Mr. Bryant that he couldn't because he was out of town. Drew Miller was called to

come get the work truck and go to Nebraska to do the work. Claimant did not report his accident during the two phone calls with Mr. Bryant, as he continued to hope that his back pain would go away.

On Sunday, July 21, 2013, claimant received a call from Mr. Bryant arranging the return of the work truck and keys to claimant in order for claimant to report to work the next day. Claimant failed to report his injury at this time.

Claimant reported for work the next day, July 22, 2013. On the way to work, claimant texted Mr. Bryant and advised him of the accident on Friday. When claimant arrived at work, he was immediately confronted by Drew, who informed claimant his services were no longer needed and his employment was terminated. Claimant did not have a chance to report his accident to Drew before he was fired, but in his text to Mike Bryant that morning he indicated he had an injury on July 19 and wanted to see a doctor. Claimant again asked about seeing a doctor and was told that the company would pursue the injury with him, but Drew refused to give claimant any information. Later that day, claimant filed an accident report. Claimant testified that he didn't know Drew was his supervisor and that is why he didn't initially report the accident to him. Instead he reported it to Mr. Bryant a few days after the accident, when he was not improving.

Claimant was told to see his family physician, and he proceeded to see Sean Conroy, PA, at Rush County Medical Clinic. Claimant reported feeling a tweak in his mid-thoracic region at the time of the accident. Mr. Conroy recommended an MRI of claimant's back. Claimant was taken off work. The day before the MRI, claimant was contacted and informed that the insurance company was denying authorization and they could proceed only if claimant paid for the MRI. Claimant did not have the MRI. He has not worked since being discharged. Claimant contends that the doctors are discouraging him from working to prevent further injury.

Before working for respondent, claimant worked for OP Trucking. This was a 24 hour on-call job, with every third weekend off. Claimant left this job for steadier work hours. Claimant admits to having low back problems while working for OP Trucking, but denies being on medical leave from OP Trucking, as was suggested by Larry Denning, a co-worker at OP Trucking. Claimant testified that he didn't have any issues that would prevent him from working at the time he left OP Trucking.

Claimant testified that in the four to five weeks he worked for respondent, he was only counseled once about his work performance and attitude. This conversation took place not long before claimant's accident. Claimant was warned that his job was on the line. Claimant acknowledged he was working under a 90-day trial period with respondent.

Claimant admits to posting on Facebook on Thursday, July 18, 2013, that he needed some serious pain pills, which respondent contends proves his problems were present at least the day before the accident. On Saturday, July 20, 2013, the day after the accident, claimant posted on Facebook that he had a tough day and was relieved he had

his wife to lean on. Claimant never posted that he was injured at work, or that he was in severe pain. The Facebook postings were done with claimant's company phone. Claimant and Mr. Miller shared eight text messages and one phone conversation on Saturday. But claimant never advised Mr. Miller of a work-related accident or of being in pain. Claimant also admits that he posted on Facebook on Saturday morning that he was getting a babysitter for his kids so that he and his wife could go out to the bar with his brother-in-law that night.

Claimant testified that when they went to the bar at 10:00 p.m. on Saturday night, he was experiencing severe pain in his back and numbness in his arm. He testified that he had worked with this same pain the day before. He testified he felt that if he could make it through work with the pain he could participate in a little fun with his brother-in-law.

Claimant also admitted to riding his motorcycle, with his wife on the back, after the accident. He testified that he didn't ride for very long. He has also mowed the lawn and performed household chores since the accident. That was the extent of claimant's physical activity.

Michael Bryant, northwest regional manger for respondent, testified that his former position with respondent was as the district manager of the Hays area. Mr. Bryant's daily routine as the district manager was to call on customers to seek new work and also to pull samples and provide analytical data and make recommendations. He also oversaw the work of the salesmen and the field techs. Mr. Bryant testified that claimant began working for the company on June 19, 2013, and worked for the company for four or five weeks before being terminated in July. Mr. Bryant testified that he was grooming Drew Miller to take over from him due to the possibility of his being promoted.

Mr. Bryant is aware claimant is alleging a work injury on July 19, 2013. He testified claimant had issues during his employment before the accident. Claimant had trouble communicating, had a horrible attitude at times and an inability to do the things he was supposed to at times. Claimant had been talked to about his work performance a week before his accident. Claimant was given the option of staying and working on the problem or leaving. Claimant chose to stay. Claimant admitted to having problems at home and claimant showed improvement for a few days. Mr. Bryant testified the company understands that not everyone excels in the same areas, so their objective was to help people better themselves in the areas they lacked. This is why claimant was given so many chances.

Mr. Bryant testified he communicated with claimant several times from July 19 to 21, and at no time did claimant communicate that he had been injured at work. Nor did claimant mention being in any kind of pain. Mr. Bryant testified that after hearing claimant's testimony he could see where claimant might think he could lose his job if he reported a work injury or serious medical condition. However, at no time did anyone tell claimant that he should not report a work injury or he would get in trouble.

On Friday, a question arose as to how claimant was to perform a certain task in Nebraska, with Four Star. Claimant assured Mr. Bryant that the job had been done and the well was pumping properly. However, on Saturday, Mr. Bryant discovered that the tanks were not pumping properly.

Mr. Bryant testified that when he called claimant on Saturday to speak with him about the problem on the job site he wasn't concerned that claimant had messed up the install, but that claimant lied about a part of the job after being given the opportunity to come clean. And then, when he was given the opportunity to correct the situation, claimant declined, and Drew had to get the work truck and take care of the problem. Mr. Bryant testified that he wasn't mad at claimant when he called. He was going to use the opportunity to show claimant what he did wrong.

> A. . . . My thought process was that he hadn't ever been asked to go out on a weekend. My thought process was that I didn't call him screaming, hollering. I said, you messed up, come out and I'll help you fix it. I'll show you what you did wrong, and he refused to do it. So that was when I -- after having our previous conversation with performance and attitude, after that is, whenever Drew showed up, we made the decision that we would be terminating his employment.[1]

Mr. Bryant intended to terminate claimant's employment on Sunday, but claimant could not be located, so his employment was terminated on Monday. Drew Miller terminated claimant's employment, as Mr. Bryant had a doctor's appointment that morning. Mr. Bryant testified that at the same time he was notified that claimant's employment had been officially terminated, he noticed he had received a text from claimant reporting that he had been injured. Claimant wanted to know the process and if it had anything to do with him getting fired. Claimant did not report the injury to Drew or Mr. Bryant until after he was fired. Claimant's claim of injury was not given a lot of merit at the time. The text was received at 6:30 a.m., and was opened by Mr. Bryant at 8:17 a.m. The text stated: "I need to see a doctor. I hurt my shoulder Friday morning loading those drums and it is not going away."[2]

Mr. Bryant testified that although claimant had been fired he felt obligated to follow procedure and figure out what happened. Mr. Bryant had every confidence claimant could do the work and excel at it if he worked harder to learn the industry.

Claimant's claim was turned over to a man named Brock to take care of the paperwork and help claimant process the claim. However, respondent was told that claimant already had an attorney and they could not contact him.

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[1] P.H. Trans. (Oct. 10, 2013) at 91.

[2] P.H. Trans. (Oct. 10, 2013) at 104.

Respondent contends there is no good justification for claimant to not say something about an injury that he contends incapacitated him for the last three months. Also Facebook postings indicate claimant was in need of pain medication the day before he claims injury. Additionally, claimant's actions during the two days after the accident are not consistent with someone who suffered a severe injury, with numbness in his arm.

At the request of his attorney, claimant met with board certified neurological surgeon Paul S. Stein, M.D., on September 16, 2013, for an examination. The history of injury while moving the drum was consistent with claimant's testimony. Dr. Stein was unable to diagnose claimant and indicated it might be a simple soft tissue injury. Dr. Stein felt that claimant needed an MRI of the cervical and thoracic spine. He also assigned temporary restrictions. Based upon claimant's provided history, Dr. Stein determined the prevailing factor for the current symptomatology was the incident at work.

At respondent's request, claimant met with board certified internal medicine specialist, Dr. Chris D. Fevurly, on September 26, 2013, for an examination. Claimant provided a history of chronic low back pain since 2006, with resulting surgery. Claimant was determined to currently have an acute strain and sprain of the upper to mid back and shoulder girdle muscles. Claimant also had non-specific right upper arm symptoms including pain and numbness of unknown causation. Dr. Fevurly opined they were not the probable result of cervical nerve root injury, cervical cord impingement or myelopathy. Dr. Fevurly opined claimant was in need of an MRI of the cervical and thoracic spine, but did not feel this is the probable result of the July 19, 2013, injury. Claimant was found to be at maximum medical improvement from the July 19, 2013, sprain/strain. The delayed recovery was the result of underlying psychosocial, behavioral and environmental factors. No permanent impairment was expected from the July 19, 2013, accident.

At the preliminary hearing of October 10, 2013, the ALJ ordered Dr. Fevurly to order MRI examinations of claimant's cervical and thoracic spines. Claimant was also referred, by the ALJ, to board certified orthopedic surgeon David W. Hufford, M.D., for an evaluation, diagnosis, recommendation for treatment, work restriction opinion and an opinion as to whether the alleged accident on July 19, 2013, is the prevailing factor in causing the injury, need for treatment, or resulting impairment or disability of claimant.

The November 7, 2013, report from Dr. Hufford was provided to the ALJ on November 18, 2013. The ALJ's resulting Order of November 25, 2013, followed. In the November 7, 2013, IME report, Dr. Hufford found claimant to display tenderness along the mid portion of the thoracic spine, with the tenderness greater on the right than the left. MRI studies performed on October 22, 2013, displayed minimal spondylotic changes at C6-7. The thoracic spine displayed a slight right paracentral disc herniation at T2-3. At T7-8 and T8-9 there were annular tears with slight left upper disc protrusions. There was no narrowing of the foramen at any level.

Dr. Hufford reported claimant's injury was consistent with his symptomatology, with an acute tissue injury occurring in the thoracic spine in the manner as described. Dr.

Hufford found claimant to have suffered a "Work-related static lifting injury with primary thoracic pain."[3] The degenerative change at C6-7 appeared to be relatively pristine, with degeneration and a slight disc protrusion, which may be an element of radiculitis into the right upper extremity. Claimant was found to be in need of further medical treatment, including physical therapy for 4-6 weeks followed by possible cervical and/or thoracic epidural corticosteroid injections. Claimant was placed under temporary restrictions in the light-medium category with constant lifting of 7 pounds, frequent lifting of 15 pounds and occasional lifting up to 35 pounds. No lifting over the shoulder level was allowed.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2012 Supp. 44-501b(a)(b)(c) states:

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(d) states:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event , usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2012 Supp. 44-508(f)(1)(2)(B)(3)(A) states:

> (f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

[3] Hufford IME Report dated Nov. 7, 2013.

> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
> (A) An injury by repetitive trauma shall be deemed to arise out of employment only if:
> (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
> (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
> (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.
> (B) An injury by accident shall be deemed to arise out of employment only if:
> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
> (3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
> (iii) accident or injury which arose out of a risk personal to the worker; or
> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

Claimant's description of the accident on July 19, 2013, is consistent with his job duties. As there were no witnesses to the incident, respondent cannot contradict claimant's testimony regarding the accident, with the exception of the allegation that claimant failed to report the incident during the many text messages and telephone calls with his supervisors. However, claimant's explanation that he hoped the condition would improve is credible for preliminary purposes.

The medical opinions of Dr. Stein and Dr. Fevurly conflict regarding the cause of claimant's current need for medical treatment. The conflict was resolved by the use of an IME doctor's opinion as ordered by the ALJ. This Board Member finds the opinion of Dr. Hufford to be persuasive.[4]

For preliminary purposes, this Board Member finds the accident on July 19, 2013, is the prevailing factor leading to claimant's current need for medical treatment. Therefore, the Order of November 25, 2013, should be affirmed.

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[4] K.S.A. 2012 Supp. 44-508(g).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant has proven, for preliminary hearing purposes, that he suffered a personal injury by accident on July 19, 2013, which arose out of and in the course of his employment with respondent. That accident is the prevailing factor leading to claimant's injury, medical condition and resulting disability.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bruce E. Moore dated November 25, 2013, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2014.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

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[5] K.S.A. 2012 Supp. 44-534a.